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JAMES D. MAHER,

Supreme Court of the United States

STANDARD VARNISH WORKS,
Libelant-Appellant,

vs.

STEAMSHIP BRIS,
REDERIOKTIEBOLAGET BORE,
Claimant-Appellee.

No. 745.
October
Term—1918.

BRIEF FOR APPELLANT.

EVERETT P. WHEELER,
JULIUS J. FRANK,
of Counsel.

JULIUS J. FRANK,
Proctor for Appellant.

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Supreme Court of the United States

STANDARD VARNISH WORKS, Libelant-Appellant, against Steamship BRIS, REDERIAKTIEBOLAGET BORE, Claimant-Appellant.	No. 745 October Term 1918.

BRIEF FOR LIBELANT-APPELLANT.

Statement.

This case comes before the Court on Certificate from the Circuit Court of Appeals for the Second Circuit. It is an advance freight case similar in some respects to the *Gracie D. Chambers,* No. 479, and the *Allanwilde,* but differs in the forms of bill of lading. The facts are adequately presented in the certificate. The appellee has asked to have the entire record certified up.

POINTS.

FIRST.

The bill of lading is to be construed as a whole.

We are not to be limited to the literal language of any particular phrase. Counsel for Claimant

treats it as if it did not contain a contract to carry certain goods from New York to Gothenburg. But the whole object of making the contract was to procure transportation to that port and delivery there. All clauses must be construed with reference to this main object of the agreement.

It was argued in the court below for the claimant that the ship was entitled to compensation for delay, and that the object of the clause in reference to return of advance freights was to protect the ship in that regard. This argument overlooks the fact which appears on the record in the case of the *Allanwilde,* 247 Fed. R., 236, and of which the court may take judicial notice, that during the war rates of freight have enormously increased. In many cases, as in that of the *Allanwilde,* the freight for a single voyage was as much as the value of the whole vessel. This increase is in part due to the increased risk, but that may be guarded against by insurance. The Government of the United States has itself undertaken to furnish insurance to ships and shippers. It cannot be said, therefore, that the advance freight clause is either necessary or appropriate for the protection of the ship. On the contrary it would have been a simple matter to frame a clause having this purpose in view, and not involving forfeiture of freight prepaid in amounts far exceeding in the aggregate any damage suffered by the ship's owners.

Much stress was laid in the District Court upon the proposition that the failure to make the voyage and transport the goods was due to the failure of the shipper to obtain a license. But this was not a condition precedent when the contract was made (fols. 33, 64), and it was through no fault

of the shipper that its application for a license when it became necessary was denied. The failure to get it was merely an incident arising out of Governmental action taken *after* the making of the contract. The controlling fact is that the United States Government, more effectively to prosecute the war, prohibited shipments to Sweden for the reason that it was expected they would be reshipped from Sweden to Germany and enable that country more effectually to carry on hostilities. This being the case, the fact that it may have been possible to get a license for the shipment of certain articles is immaterial. It never was at any time possible to obtain a license for the shipment of the goods in question after the Government refused to allow their export to Sweden without a license. The effect of this action of the Government after the goods were delivered to the carrier, was to make the performance of the contract illegal. It was legal when made. The only license then required, the British Navicert, was obtained before the delivery of the goods. The case, therefore, is one where a contract, valid when made, becomes illegal and in fact impossible of performance before the ship begins the voyage.

SECOND.

The fundamental questions upon the construction of the material clauses of the Bill of Lading are therefore these:

Do they apply to a case where the contract is dissolved by the act of the Government? Do they

mean that in such case the freight is to be retained by the shipowner? Or may reasonable effect be given them by holding that if the contract should not be performed by the shipowner, he is not liable in damages to the shipper, but shall not retain the advance freight.

In the *Gracie D. Chambers* these questions are answered by the Circuit Court of Appeals by the word *"irrevocable."* What is irrevocable cannot be revoked, the Court held. But no such word is used in the case at bar. In this case the agreement that freight is earned on the shipment of the goods is revoked or dissolved by the "commercial frustration of the adventure."

The proclamation of the President of August 27, 1917, to take effect August 30 (fol. 33), the refusal of the *thereafter* required license, and the action of claimant in discharging the cargo dissolved the contract between the parties. It constituted what in the recent phrase of the books is called "commercial frustration of the adventure." The recent authorities agree that under such circumstances the contract is dissolved. The rights of the parties upon such dissolution, vary according to the extent to which the contract has been performed, but the action of the Government, if adequate in extent, does amount to a dissolution of the contract.

Horlock vs. *Beal,* 114 Law Times Rep., 193.

This was an action by the wife of a British seaman upon an allotment note. The ship was seized by the Germans at the beginning of the war; the sailors were kept on board until November 2, 1914,

and they were then taken ashore as prisoners. It was a test case, and went to the House of Lords. All the judges who heard the case agreed that if the performance of the contract had become impossible by an act of the law, the contract would be dissolved. They differed as to whether in the case of the seaman's contract for a fixed term, his arrest and imprisonment by the German Government for an uncertain period would dissolve the contract. The majority held that it would, the minority that it would not.

Admiralty Shipping Co. vs. *Weidner*, 114 Law Times Rep., 171.

This was an action on a time charter. It was referred to referees. On their first report it came on before Scrutton, J. He referred it back to the arbitrators to find whether there had been a "commercial frustration of the adventure." They reported that there had been. The vessel had been interned in a Russian port. The case came back on their report and Bailhache, J., held that this internment being for an indefinite period did not amount to a "commercial frustration of the adventure," but conceded the principle that if it had been final the rule would have been otherwise.

The same distinction was sustained in

Tamplin S. S. Co. vs. *Anglo Mexican Co.*, 115 Law Times Rep., 315.

This was a case of a time charter of a tanker for 60 months from May, 1912. In December, 1914, she was requisitioned by the British Government

for a troop ship for an indefinite period. The House of Lords held that the taking being for an indefinite period did not dissolve the contract. Lord Haldane and Lord Atkinson dissented. All the judges maintained the principle for which we contend, that the action of the Government in entirely preventing the performance of the contract would dissolve it.

If, then, the action of the United States Government dissolved the contract, what claim can the ship have to retain the advance freight? She never sailed on the voyage for which she contracted. This contract could not be dissolved, so as to release her, and at the same time remain intact, so as to enable her to hold on to the freight, which she never earned.

The Bill of Lading expressly agrees in its first sentence as follows:

> "Received in apparent good order and condition from Standard Varnish Works to be transported by the Steamship Bris, now lying in the port of New York, and bound for Gothenburg * * * 100 barrels varnish * * * to be delivered in like good order and condition at the port of Gothenburg."

Confessedly the claimant never began this voyage. It never transported the varnish to Gothenburg and never delivered it there. No doubt it is exempted from liability for this failure by that portion of the second clause which provides that the carrier shall not be liable for loss "occasioned by arrest and restraint of princes, rulers or people." But the same rule which exempts the ship from liability for

its failure, deprives it of the right to retain the money which it received for the transportation of the goods from New York to Gothenburg. In short, there is a total failure of consideration. In such cases, the party who has made advances under the contract can always recover them.

Spring Company vs. *Knowlton*, 103 U. S., 49.

Even when a contract has been partly executed, the party rescinding must return the consideration.

American Union Tel. Co. vs. *Union Pacific R. Co.*, 1 McCrary, 188.

THIRD.

Clauses in question construed strictly.

In construing this contract the legal relation of the parties is important. Claimant is a common carrier. Libelant had a right to go to this carrier and say: "Take these goods for me from New York to Gothenburg and I will pay you a reasonable compensation." The carrier would have had no right to refuse.

It is true the courts have said that in consideration of a reduced rate of freight the liability of a carrier by the maritime law and by the common law might in some respects be limited. But there is no intimation in this case of any such condition, no allegation of clauses limiting liability in consideration of a reduced rate.

Instead of this the claimant tenders a bill of lading which does indeed contain in its first paragraph the brief contract which the law would import, but following this, in fine type, are a great many clauses which attempt in a myriad ways to limit the legal liability of the carrier. The question of the validity of these clauses will be considered hereafter. We are now dealing with their construction.

Claimant relies upon the 6th and 7th clauses in the Bill of Lading. As to these, we claim, they are to be construed strictly. To use the language of the Circuit Court of Appeals in

Lines vs. *Atlantic Transport Co.*, 223 Fed., 624, 625,

> "If he has not made his exception clearly and unmistakable in the form our Courts recognize as valid, he has not made one he can enforce here."

The language of the Bill of Lading is that of the carrier. It is drawn by his counsel. He delivers it to the shipper. To use the language of the Supreme Court, the shipper "cannot afford to higgle." He must take what the carrier gives him.

R. R. Co. vs. *Lockwood*, 17 Wall., 357.

At page 379, this Court said:

> "The carrier and his customer do not stand on a footing of equality. The latter is only one individual in a million. He cannot afford to higgle or stand out and seek redress in the

courts. His business will not admit of such a course. He prefers rather to accept any Bill of Lading or sign any paper the carrier presents and often indeed without knowing what the one or the other contains."

This language is repeated in

The Montana, 129 U. S., 441.
S. P., Baltimore & Ohio Co. vs. *Voigt*, 176 U. S., 498, 505.

Construed thus, the language of the Bill of Lading in reference to prepaid freight applies only when the voyage has actually begun. It "is to be retained by the vessel's owners, vessel or cargo, lost or not lost." The reasonable construction of these words is that if the vessel sails on her voyage and is lost, and the delivery of the cargo is thereby prevented, the shipowners will be entitled to retain the prepaid freight.

S. P., Christie vs. *Davis Coal & Coke Co.*, 95 Fed., 837.

At page 838, that great Judge, Addison Brown, thus stated the law:

> "The presumption that freight is payable only upon the cargo delivered rests therefore upon equitable grounds and this equitable presumption ought to prevail unless the contract of the parties expresses a contrary intent with reasonable clearness and certainty."

Affirmed C. C. A., 110 Fed., 1006, on Judge Brown's opinion.

Great Indian Railway Co. vs. *Turnbull*, 53 Law Times Reports, 325.

In this case the advance freight was recovered by the shipper. Denman, J., said the money was paid as freight and not as "consideration for taking the goods on board."

Ex parte Nyholm, 29 Law Times Rep., 634.

The Court of Appeals (Lord Selborne and Lord James) held that when the voyage was not begun the advance freight could be recovered by the shipper. At page 635 the Court said:

> "The ship never earned freight and never began to earn freight."

This is the controlling factor.

The Tornado, 108 U. S., 342.

This Court held that the agreement to pay freight is conditional upon performance by the ship. If that becomes impossible the ship has no right to freight. The contract is dissolved, and the ship owner cannot even recover what he has paid to put the cargo in condition for shipment. In this case the payment was for compressing cotton.

Kelly vs. *Johnson*, 3 Wash. C. C., 45,

applies the same rule to the dissolution of a contract by an embargo and refused any compensation to the shipowner.

Scrutton on Charter Parties, Section X, Article 137, 8th Ed., page 321.

Advance freight "will be recoverable (from the shipowner) if the goods are not lost by excepted perils or if the shipowner has not fulfilled the conditions precedent of the starting, within a reasonable time, of a seaworthy ship on the agreed voyage."

FOURTH.

When all the language of Clause 7 of the Bill of Lading is considered it appears that this applies only to a case where the ship has begun the voyage and is "prevented from reaching her destination."

The final clause in the Bill of Lading was inserted to relieve the carrier from liability in case after inception of the voyage the vessel should be seized or detained by one of the belligerents. It can have no application to the conditions which existed in this case. The vessel was not seized. There was nothing to prevent her sailing for Gothenburg. The United States Government prohibited the transportation of the cargo. This prohibition was not effective until after the contract was made.

To use the language of Mr. Justice Washington in Kelly vs. Johnson, 3 Wash. C. C., 45, 47:

> "It could not operate further than to discharge the defendants from the claim for damages, for not carrying the cargo, when

> the restrictions of the embargo should be removed; but certainly not to entitle the defendants to claim freight or anything in the nature of it, or damages from the plaintiffs."

To impute to the Government the intent to present the carrier with a large sum of money for which he had given no consideration would be unreasonable.

The construction thus contended for is in accord with the decisions in

> The Carib Prince, 170 U. S., 655.
> The Caledonia, 157 U. S., 124.

In these cases the Bill of Lading exempted the carrier from liability for damage caused by "latent defects." It was held that this did not apply to latent defects, existing at the beginning of the voyage, but that the warranty of seaworthiness continued to be absolute, notwithstanding this exemption. These decisions turned upon the essential distinction between events which occur before the voyage begins and those which occur afterwards.

FIFTH.

Prepayment of the freight was subject to the implied condition that the performance of the contract, legal at the time, would continue to be legal. Otherwise the real consideration for the contract fails.

It is argued for the claimant upon certain authorities cited by its counsel that a very slight

consideration, even a trifling one, is sufficient to support a contract. That as a general proposition is true. But as applied to this case the proposition contended for overlooks actual conditions. The real contract was not that in consideration of the ship providing storage for the varnish the shipper should pay the sum which it now seeks to recover. The freight was paid in consideration of the transportation and delivery. This was the real consideration. The reception of the goods by the carrier was only an incident. If the transportation failed the delivery failed also. In point of fact the goods were actually unshipped and returned to the shipper when the Government announced its final refusal to permit transportation. Could anything show more clearly what the real consideration of the contract was, and that it had failed?

The general statements in the text books which are cited by the claimants are all subject to the same rule of construction contended for under the First Point. It is impossible for the most learned author to state the whole law on a given subject in one paragraph. Each paragraph necessarily deals with a portion only of the law which is under consideration. Therefore these general statements are to be construed with reference to decisions on the subject of failure of consideration, and the case is to be considered, not as if the contract had been to pay a certain sum of money in consideration of the delivery of the goods to the ship, but as a contract to receive the goods and transport to Gothenburg, which the United States refused to permit the carrier to perform.

SIXTH.

It is argued that the carrier may throw the risk of the loss of goods upon the shipper, and that if he may do this he may also throw upon the shipper the risk of losing his advance freight. The distinction between the two cases is obvious. The loss of goods during the voyage may be insured against. But there is no form of insurance known to counsel which would indemnify the shipper against a loss arising from the prevention of the voyage by the act of the law.

Counsel cites numerous cases to the effect that when a voyage which has once been begun is broken up by a shipwreck the advance freights which have been paid are not recoverable by the shipper, in cases where there were clauses in the bill of lading similar to those under examination here. The distinction between those cases and the cases at bar is this: The possibility of wreck is an incident to every voyage. Human skill has done much to guard against this danger. But it is inadequate for complete protection. For this reason it is common for shippers to insure their goods against perils of the sea. In such cases there can be no reason why the carrier should pay the loss. In fact, in such cases the shipper would ordinarily include the advance freight in his valuation of the goods. This payment would be as much a part of their value as any other charges which were necessary to complete the transportation.

It is argued for the claimant that the breaking ground is "a metaphysical subtlety," and that there can be no valid distinction in the construction of clauses against the repayment of advance

freight, whether the voyage has been begun or not. This argument is fallacious. When the voyage is begun it is subject always to perils of the sea, and in case of war to breaking up through embargoes, blockades, or capture. As long as the vessel remains in her home port she is in safety. These perils do not there exist.

The true construction of the clauses in reference to war risks relied upon by the claimant is that they were designed to relieve the ship from any claim for damages for failure to transport the goods. In the outset there is an absolute agreement to transport and deliver. This involves a liability on the part of the ship for a failure to transport. It is perfectly suitable that clauses should be drawn to relieve the ship from this liability in time of war. It might very well be that the restraint during a voyage would not be final but would involve only delay. This risk, however, might be serious and the clauses protect the ship from liability on this ground.

SEVENTH.

Regarding the contract as not dissolved, but performance for the time being suspended, by governmental act:

It does not appear that the carrier might not have carried out its contract if it had acted with due diligence.

It received the cargo and issued its Bill of Lading therefor, August 13th. The President's Procla-

mation requiring a license, was made August 27th, to take effect August 30th (fol. 33). There was, therefore, a period of a fortnight to seventeen days during which the voyage might have been undertaken, and almost, perhaps quite completed. Under well settled principles the burden of explaining this delay is on the carrier, especially where, as here, subsequent events made performance impossible.

Again, the shipper did not release the carrier or in any way consent to the abrogation or termination of the contract, except on repayment of prepaid freight (fol. 16).

The carrier undertook to refuse absolutely to perform its contract of carriage and delivery. The Government's *ex post facto* regulations requiring licenses cannot be urged as a justification, unless, at the least, the carrier makes tender of the prepaid freights. *Non constat* that the shipper would have been willing to await a modification or revocation by the Government of the license regulations, or that, sooner or later, an exception might have been made in favor of the shipment in question. In the absence of a breach of the agreement by the shipper, which is not alleged and which in fact did not exist, the carrier must be held either to performance, or a declaration before breach of readiness to perform on the removal of obstacles arising without its fault, or, if it desired, a cancellation of its obligation upon a refund of what it had received as compensation for performance.

The allegations in the answer of readiness to perform (fol. 45) are mere statements of conclusions of law, and as such, of course, are not admitted as facts. In any event they relate to a

period subsequent to that arbitrarily fixed by the carrier for the annulment of its contract.

EIGHTH.

The clauses of the Bill of Lading on which the claimant lays stress are intended in the language of Knox, J., to "release the carrier from liability for loss or damage" where certain specified causes prevent its performance of its contract without its fault. But this is a very different thing from permitting it to *retain the stipulated price of performance without having performed,* or holding itself ready to perform when hindering causes shall have ceased to prevent performance. The case at bar does not present the question of the "ability of the carrier to limit its responsibility" (fol. 79), but the question of the carrier's right to refuse to perform, and still retain what has been paid it in consideration of its agreement to perform, its contract to carry and deliver.

A careful analysis of the clauses relied on by the claimant will show that they all relate to a *voyage* which has been *commenced* and interrupted. The Court will not extend them for the carrier's benefit. The carrier might have provided for the contingency which actually arose, because, equally with the shipper, it had knowledge of existing conditions and their possibilities (fol. 78). It made no such provision. It did not attempt to exact of the shipper an agreement that prepaid freight might be retained even though, without the shipper's consent, it should unload the cargo at the shipper's expense without as much as the ship's having left

her moorings. It is not conceivable that such an attempt would have succeeded with any shipper, and such an agreement can not be said to have been contemplated by the parties.

The Bill of Lading contains no clause authorizing the carrier under any circumstances to unload and return to the shipper any cargo before commencing the stipulated voyage, even upon tender of prepaid freight. The claimant, however, asks the Court to read into the contract, drawn by the claimant and forced on the shipper, not only authority thus to rid itself of its obligation, but also to mulct the shipper to the extent of the prepaid freight. It may be safely said that this degree of liberality toward the carrier in the construction of its Bill of Lading would be contrary to well settled principles and to precedent.

NINTH.

In the Court below claimant sought to justify the retention of the freight money as compensation for the loss of opportunity to make other voyages while holding the Bris for the accommodation of Libelant and other shippers. To this it may be answered that there is no allegation in the answer, and, of course, no proof that any such opportunity existed. Nor will this Court infer the fact, especially as every inference from the alleged and admitted facts must be to the contrary, not to speak of the common knowledge of men of the enforced idleness, at the time under discussion, of all neutral, and especially of Swedish, shipping.

TENTH.

The argument that the whole question is one of Insurance has frequently been presented, but always overruled by the federal courts. These have always decided carrier cases upon the merits of each clause as presented, leaving the parties to work out the problem of insurance for themselves. This was done, for example, in The Prussia, 93 Fed. 837, affg. 88 Fed., 531. The full name of the case cited as The Montana, 129 U. S., 397, was the Liverpool, etc., SS. Co. vs. Phoenix Ins. Co. The Insurance Company had in each case paid the loss, and was subrogated to the rights of the insured, whatever they were.

Whatever the final decision in these advance freight cases, policies will be framed to meet them. This consideration need have no weight with the Court.

ELEVENTH.

If the Bill of Lading is to have the construction contended for by the claimant, the clauses relied upon are against the policy of the law of this country and are invalid.

The Kensington, 183 U. S., 263.

This case distinctly held that clauses in carriers' contracts limiting the carrier's liability, if unreasonable, are void.

In that case the limiting to 250 francs of the recovery for damage to passengers' baggage not accompanied by a provision for paying more for a

higher valuation, was held to be unreasonable and void. In short the Court held that the carrier had no right to say that he would accept the goods only upon his own terms. He has a public duty to perform.

Chicago, etc., Railway Co. vs. *Solan,* 169 U. S., 133, 135.

In this case this Court held that a contract limiting the liability of the ship was void "as attempting to put off the essential duties resting upon every public carrier by virtue of his employment." This was quoted and approved in *Calderon* vs. *Atlas Steamship Co.,* 170 U. S., 279, 282.

In *Adams Express Co.* vs. *Croninger,* 226 U. S., 491, at page 509, the Court, after referring to the common law liability of carriers, said:

"The rigor of this liability might be modified by any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants."

We submit that the clauses in question, if given the construction contended for by claimant, are neither fair, reasonable nor just. The moment the cargo was discharged, the ship was free to engage in other employment. In the case at bar, the carrier is alleged to have been diligent to give the shippers full opportunity to obtain licenses. But this sub-

13 Corpus Juris 411.
McMullen v. Hoffman, 174 U.S. 639.
Luhrig Coal Co. v. Jones, 141 Fed.617.

If claimant's construction is valid, it might have discharged the cargo immediately after the

proclamation of August 27, retained the freight money and engaged in another voyage.

It is a matter of common knowledge, of which the Court will take judicial notice, that during the war the demand for shipping has far exceeded the supply. In the case of the Allanwilde, 247 Fed., 236, the ship was libeled for damages for failure to transport the cargo, and also for the return of the freight money paid in advance. She was sold by order of the Court and brought no more than the freight money. It frequently happens that the insurance on the freight amounts to as much as the insurance on the vessel. In the case at bar the ship-owner takes the extraordinary position that it had the right to keep the money which it had received for transporting libelant's varnish to Sweden, then fail to transport it, put its vessel into another service and thus earn a double compensation.

The argument for claimant is that frequently clauses have been sustained in bills of lading which provided for the retention of prepaid freight. In those cases, however, so far as our examination goes, the voyage had begun. The consideration for the contract had not totally failed. There was no "commercial frustration of the adventure." The cases cited under the Second Point, show that this is a controlling distinction. What could be more unreasonable than the clause on which claimant especially relies? To say that freight is earned when the shipper has delivered goods to the ship, and before the voyage contracted for is begun, is a contradiction in terms. One might as well say that wheat is converted into flour the moment it is delivered to the miller.

In the Kensington (supra), a clause to the effect that a passenger's baggage was not to be considered as worth over 250 francs was held unreasonable and invalid. How much more unreasonable to say that freight is earned before anything is done to earn it.

TWELFTH.

If the construction contended for by claimant is correct, the clauses in question would be void under Sections 1 and 2 of the Harter Act (27 Stat. at Large, 445).

Section 1 makes it unlawful for the shipowner to insert in any Bill of Lading any clause whereby the ship or the owner shall be relieved from liability for loss arising from failure in proper delivery of any merchandise committed to its charge. Any clauses of such import "shall be null and void."

Section 2 makes it unlawful for any vessel or her owner to insert in any Bill of Lading any agreement whereby the obligation of the "master, officers, agents or servants to carefully handle and stow her cargo, and to care for and properly deliver same shall in any wise be lessened, weakened or avoided."

Under claimant's contention, its obligation to deliver the cargo is lessened and weakened, to say the least. It ceases to be for the interest of the shipowner to deliver the cargo. The clause expressly makes it for the interest of the owner not to deliver it, but to avoid delivery. If it can give up the voyage and yet

retain the freight, put the vessel in another employment, and thus earn double pay, obviously its obligation is diminished. It was on the ground of the impairment of the obligation of the carrier to care for the cargo that this Court held that clauses exempting the carrier from liability for negligence of his servants were void as against public policy.

Bank of Kentucky vs. *Adams Express Co.*, 93 U. S., 174.
The Montana, 129 U. S., 397.
N. J. Steam Navigation Co. vs. *Merchants' Bank*, 6 Howard, 344.

The clauses in question, if they can be construed as contended for by the claimant are open to the same objection and cannot therefore be sustained.

The Harter Act was very carefully considered in the Senate and amended after great deliberation. All parties in interest, shippers, ship owners and insurers were fully heard. On reporting it, Mr. Frye, Chairman of the Committee on Commerce, said:

> "It had the unanimous agreement after long hearings, of the Committee on Commerce" (24 Congressional Record, page 1180).

Full effect must therefore be given to all its provisions. The movement for the passage of such a bill was the result of two causes:

1. The introduction by carriers of unreasonable clauses into their bills of lading. An example of one of the most unreasonable of these is to be found in

Tattersall vs. National S. S. Co., L. R., 12 Q. B. Div., 297 (decided in 1884).

2. The conflict between the Courts of Great Britain and the State of New York, on the one side, and the Federal Courts, and the Courts of many States on the other, as to the validity of clauses exempting the carrier from liability for negligence.

The result was a compromise. The first two sections of the Harter Act deal with the carrier's liability before the voyage begins and with its liability for proper delivery of the goods. All clauses lessening or weakening its responsibility in these respects are prohibited. On the other hand the third section relieves the carrier from liability for "faults or errors in navigation or in the management of said vessel" provided the owner shall exercise due diligence to make her "in all respects seaworthy and properly manned, equipped and supplied."

These sections declare the policy of the United States. The liability of the ship owner is absolute up to the time the voyage begins. After that, he is exempt, if he has used due diligence.

> "Read as a whole the purpose of the act manifestly is, on the one hand, in the interest of the public to prevent carriers from evading responsibility to exercise due diligence in providing seaworthy vessels and in the handling and care of the cargo, and, on the other hand, whenever they have exercised due diligence in these respects, to absolve them from liability for losses arising during the transit from the

perils of the sea and from faults or errors in the navigation or management of vessels."

Chief Justice Wallace in the Silvia, 68 Fed., 230, 233; 15 C. C. A., 362, 364; 35 U. S. App., 395.

To apply this policy to the present case: If the Bris had sailed and been sunk by a submarine, or captured by a cruiser, her owner would have been entitled to retain the freight money. But she never sailed, and he therefore must give it up.

The dominant purpose of this Act was not so much to put American shipowners on an equality with the owners of foreign ships as it was to make a just ruling which would be satisfactory to all parties in interest. That Act was the result of great deliberation. Shipowners, shippers, insurance companies, Chambers of Commerce, various mercantile bodies all were heard and all cooperated in framing that Act in its final form.

Wendt, Maritime Legislation (3 Ed.), Ch. II, pages 295-511.

The best evidence that it was satisfactory to all parties is that immediately after its passage the owners of foreign vessels inserted clauses in their bills of lading incorporating by reference the provisions of the Harter Act. Many such cases have come before this Court for consideration, as they have before the English courts.

Dobell vs. SS. Rossmore Co., L. R. (1895), 2 Q. B., 408.
The Glenochil ibid. [1896], Prob. 10.

It is said that the Harter Act was an enabling and not a restrictive act. This deals only with a portion of the Act. It is both enabling and restrictive. It frees the shipowner from liability for negligence of master or mariners during the voyage; it restricts him from limiting his liability for acts done before the inception of the voyage. The claimant is now attempting to get rid of the restriction.

THIRTEENTH.

The question certified to this Court should be answered in the negative.

December, 1918.

EVERETT P. WHEELER,
JULIUS J. FRANK,
of Counsel.